Supreme Court, U.S.
FILED
DEC 29 1992
OFFICE OF THE CLERK

No. 92-743

In the Supreme Court of the United States

OCTOBER TERM, 1992

ROSEMARY ECKERSLEY AND ESTATE OF DR. FRANKLIN ASHLEY, DECEASED, BY ROSEMARY ASHLEY (ECKERSLEY), EXECUTRIX, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

JAMES A. BRUTON
Acting Assistant Attorney General

RICHARD FARBER
JOY L. PRITTS
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the unrestricted form extension agreement signed by petitioners and the United States was effective to extend the statute of limitations on the assessment of taxes for petitioners' 1978 and 1979 taxable years.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Courson v. *Commissioner*, 59 T.C.M. 429 (1990)	8
Hicks v. *Commissioner*, 62 T.C.M. 1234 (1991)	8
Manetti-Farrow, Inc. v. *Gucci America, Inc.*, 858 F.2d 509 (9th Cir. 1988)	7
Piarulle v. *Commissioner*, 80 T.C. 1035 (1983)	7
Press Machinery Corp. v. *Smith R.P.M. Corp.*, 727 F.2d 781 (8th Cir. 1984)	7
Roszkos v. *Commissioner*, 850 F.2d 514 (9th Cir. 1988), cert. denied, 489 U.S. 1012 (1989)	7
Schulman v. *Commissioner*, 93 T.C. 623 (1989)	7, 8
Smith v. *Commissioner*, 925 F.2d 250 (8th Cir. 1991)	7
Stange v. *United States*, 282 U.S. 270 (1931)	6
Tiffany Fine Arts, Inc. v. *United States*, 469 U.S. 310 (1985)	9
Windfall Grain Co. v. *Commissioner*, 23 B.T.A. 725 (1931)	8

Statute:

Internal Revenue Code, 26 U.S.C. 6501(c)(4)	6

Miscellaneous:

4 W. Jaeger, *Williston on Contracts* (3d ed. 1961)	7
M. Saltzman, *IRS Practice and Procedure* (1981)	3

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-743

ROSEMARY ECKERSLEY AND ESTATE OF DR. FRANKLIN ASHLEY, DECEASED, BY ROSEMARY ASHLEY (ECKERSLEY), EXECUTRIX, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) and the order entered by the district court (Pet. App. 10a-14a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 24, 1992. The petition for rehearing was denied on June 29, 1992 (Pet. App. 17a). Justice O'Connor entered an order extending the time for

filing a petition for a writ of certiorari to and including October 27, 1992. The petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Rosemary Ashley Eckersley and her husband Franklin Ashley (the Ashleys) timely filed their joint 1978 and 1979 federal income tax returns.[1] During an audit of these returns, the Internal Revenue Service sent an unexecuted Form 872-A (Special Consent to Extend the Time to Assess Tax) to Scott Brown, a legal assistant at the law firm representing the Ashleys. The accompanying cover letter explained that the Form 872-A would extend the statute of limitations for the taxable years 1978 and 1979 for an indefinite period. The letter stated that the extension was necessary because (Pet. App. 3a)

> the partnership of Harvest of which Franklin Ashley is a partner is currently under examination. Since we intend to solicit a partial agreement for the taxable years 1978 and 1979 based on the closing agreement and place the case in our suspense section until the resolution of the Harvest partnership issue, the extension of Form 872-A is solicited.

The Ashleys signed the form agreement on February 25, 1982, and the executed form was returned to the IRS (Pet. App. 2a-3a). The executed agreement broadly extends the statute of limitations for the assessment of "any Federal Income tax due on any re-

---

[1] Franklin Ashley died in February 1985. Pet. App. 4a. This action was brought by petitioners—his estate and his surviving spouse.

turn(s) made by or for the above taxpayer(s) for the period(s) ended December 31, 1978 and December 31, 1979" (Rivard Dep. Exh. 6). The agreement contains *no* restrictions on this waiver of the statute of limitations (Pet. App. 11a).[2]

When Brown mailed the Ashleys' executed extension agreement to the IRS, his cover letter stated that he "would like to confirm that upon the Ashleys' submission of Form 872-A for tax years 1978 and 1979, those years will be closed pending completion of your examination of Harvest Partners" (Pet. App. 3a). Without any further communication, the form extension agreement was counter-signed by an authorized employee of the IRS (*ibid.*).

2. In July 1982, the IRS sent Brown a different form agreement (Form 870) to resolve, by partial settlement, certain other matters at issue in the Ashleys' 1978 and 1979 taxable years (Pet. App. 4a, 11a).[3] The letter accompanying this form stated that

---

[2] The extension agreement has no specific time limit, but it contains procedures for its unilateral termination by either party. To terminate the Form 872-A extension agreement, the taxpayer may send the IRS a Form 872-T (Notice of Termination of Special Consent to Extend the Time to Assess Tax). The IRS may terminate the agreement either by mailing the taxpayer a Form 872-T or by issuing a notice of a deficiency in taxes for the relevant tax period. Absent these actions, the Form 872-A expires when the IRS makes a final assessment of taxes (Pet. App. 5a-6a).

[3] A Form 870 permits the immediate assessment and collection of the tax and relieves the IRS of the requirement of sending the taxpayer a notice of deficiency. It does not, however, prohibit further assessments within the allowable periods of limitations. See M. Saltzman, *IRS Practice and Procedure* ¶ 9.08[1] at 9-42 (1981).

the case "will be held in suspense until the closure of the Harvest Partnership for the taxable years 1978 and 1979 and Comark Partnership for the taxable year 1979" (*id.* at 4a). Brown subsequently returned the executed partial settlement (Form 870) with a cover letter stating (Pet. App. 4a):

> In February, 1982, you agreed to close 1977, 1978 and 1979 pending a completion of the audit of Harvest Partners. This was agreed to by the taxpayer. You now want to include CoMark as an open item for 1979 (reference June 7, 1982 letter). We must object to your inclusion of CoMark in the Ashley's [*sic*] 1979 tax year since it was embodied as an open item after we struck our agreement.

3. Petitioner thereafter took no action to terminate the extension agreement for assessment of taxes for petitioners' 1978 and 1979 tax years. See note 2, *supra*. In 1985, the IRS notified the Ashleys that it was disallowing partnership deductions claimed with respect to both the Harvest and Comark Partnerships for the years at issue. The IRS proposed resulting income tax deficiencies in the amount of $95,174.97 for 1978 and $309,373 for 1979. Petitioners filed a protest to the notice of deficiencies but did not allege a statute of limitations defense. Pursuant to stipulation, all but $150,000 of the partnership deductions were disallowed (Pet. App. 4a-5a).

The IRS then made assessments against petitioners for the 1978 and 1979 taxable years in the total amount of $297,660. Petitioners paid the assessments, without interest, and simultaneously filed a claim for refund, which was denied (Pet. App. 5a, 11a).

4. Petitioners then brought this refund action in federal district court (Pet. App. 5a). In the complaint, petitioners did not challenge the assessments on their merits. They alleged instead that the assessments were barred by the statute of limitations (*id.* at 16a). Petitioners did not dispute that the assessments were made within the extended period of limitations provided by the form extension agreement. They claimed instead that the cover letter accompanying the extension agreement "restricted the waiver of the statute of limitations to the Harvest Partners issue" (*id.* at 12a). In the alternative, petitioners asserted that their waiver of the statute of limitations was a nullity because there is no agreement as to its proper scope (*id.* at 2a).

The district court rejected petitioners' contentions, holding that the assessments were timely under the express terms of the extension agreement (Pet. App. 12a-14a). The court noted that the Form 872-A extension agreement is clear on its face and, by its very terms, provides a general, unrestricted waiver of the statute of limitations for the assessment of *any* taxes for petitioners' 1978 and 1979 tax years (*id.* at 13a-14a). The court further held (*id.* at 13a) that the cover letter sent with the executed agreements by Brown—which stated that the extension would be in effect "pending completion of" the Harvest Partnership audit—did not limit the extension to assessments made *with respect to* the Harvest Partnership (*ibid.*). The court held that, to the extent the language in the cover letters imposed *any* restriction on the extension period, it was a *time* restriction only—that all deficiences be assessed upon the completion of the IRS audit of Harvest Partners (*ibid.*). The court noted

that "[i]t is undisputed that the IRS complied with this time restriction" (*ibid.*).

5. The court of appeals affirmed. The court held that the Form 872-A extension agreement unambiguously extended the period of assessment for "any" income taxes petitioner owed for 1978 and 1979 (Pet. App. 7a). The court stated that, while a transmittal letter containing clear, unambiguous language may limit a facially unrestricted waiver, the cover letters in this case did not contain such language. They thus did not restrict the scope of the broad and clear language contained in the signed extension agreement (*id.* at 7a-8a). The court further noted that the Brown cover letter lacked any legal significance in any event because, as a legal assistant, Brown was not authorized to represent the Ashleys before the IRS and had no legal power to negotiate or execute documents on their behalf (*id.* at 8a).

ARGUMENT

The court of appeals correctly held that the assessments made against petitioners were timely under the clear and unambiguous terms of the form extension agreement executed by the parties. This decision does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

1. Although a waiver of the defense of the statute of limitations "is not a contract" (*Stange* v. *United States*, 282 U.S. 270, 276 (1931)), Section 6501 (c)(4) of the Internal Revenue Code requires the terms and duration of an extension of the statute of limitations for assessment of taxes to be set forth in a written agreement. 26 U.S.C. 6501(c)(4). Contract principles are therefore relevant in determining

the terms of the extension agreement. See *Roszkos* v. *Commissioner*, 850 F.2d 514, 516 (9th Cir. 1988), cert. denied, 489 U.S. 1012 (1989); *Schulman* v. *Commissioner*, 93 T.C. 623, 639 (1989); *Piarulle* v. *Commissioner*, 80 T.C. 1035, 1042 (1983).

It is, of course, a basic principle of contract interpretation that, when a written agreement is unambiguous on its face, the intent of the parties is to be discerned from the language of the document. See *Manetti-Farrow, Inc.* v. *Gucci America, Inc.*, 858 F.2d 509, 514 (9th Cir. 1988) (parole evidence is inadmissible to interpret an unambiguous contract); *Press Machinery Corp.* v. *Smith R.P.M. Corp.*, 727 F.2d 781, 784 (8th Cir. 1984); 4 W. Jaeger, *Williston on Contracts* § 600A (3d ed. 1961). The court of appeals properly applied this contract principle in this case.

In this case, the Ashleys signed a form extension agreement that indefinitely and unequivocally extended the period for the assessment of "any" income taxes due for their 1978 and 1979 taxable years. See page 2, *supra*. The Ashleys could have altered the form extension agreement before signing it to make it effective only for additional assessments relating to a particular issue. See, *e.g.*, *Smith* v. *Commissioner*, 925 F.2d 250 (8th Cir. 1991). The Ashleys, however, did not make any modifications to the broad language of the extension agreement. As the court of appeals correctly held (Pet. App. 6a), because the executed form is clear and unambiguous, it is conclusively presumed to reflect the agreement of the parties.

2. Petitioners do not suggest that the decision of the court of appeals conflicts with any decision of this Court or of any other court of appeals. Indeed, the petition does not cite any appellate decision for

any purpose. Instead, petitioners assert (Pet. 10-13) that the courts below departed from various Tax Court decisions concerning the weight to be given to correspondence between the parties in determining whether there was mutual assent to the scope of the waiver. That contention is misconceived.

The court of appeals, and the district court, did not disagree with the Tax Court decisions on which petitioners rely. The Tax Court has held that transmittal letters may modify a facially unrestricted form extension agreement if such letters are mailed contemporaneously with the form and contain clear, unambiguous language restricting or conditioning the accompanying waiver. See *Hicks* v. *Commissioner*, 62 T.C.M. (CCH) 1234, 1236 (1991) (waiver restricted where the transmittal letter from the IRS expressly stated that it would audit only one issue); *Courson* v. *Commissioner*, 59 T.C.M. (CCH) 429, 432 (1990) (waiver not restricted where the IRS cover letter merely referred to a partnership under audit, but made no promise to limit its review to that issue); *Schulman* v. *Commissioner*, 93 T.C. 623, 641 (1989) (no restriction created by transmittal letter); *Windfall Grain Co.* v. *Commissioner*, 23 B.T.A. 725 (1931). In this case, the courts below examined the transmittal letters and concluded that they did *not* contain the requisite clear, unambiguous language necessary to effect a modification of the broad, plain language of the extension agreement (Pet. App. 7a-8a, 13a).

As both courts below pointed out, the transmittal letter from the IRS did not promise to limit the audit to the Harvest Partnership. Instead, the letter simply explained that the partnership was under review and that the case would be open pending completion

of that review (Pet. App. 8a, 13a). The courts below properly concluded that, while the letter from Brown transmitting petitioners' executed form extension agreement mentioned Harvest Partnership, the letter did not expressly limit the waiver to assessments relating to that partnership (*ibid.*). Contrary to petitioners' assertions, the district court and the court of appeals examined the transmittal letters, and both courts concluded that those letters were insufficiently specific to modify the express terms of the extension agreement that the parties had executed.[4]

This fact-bound conclusion reached by both of the courts below does not warrant further review. See, *e.g.*, *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 317-318 n.5 (1985).

---

[4] Contrary to petitioners' assertions (Pet. 14), the court of appeals did not disregard Brown's cover letter or find that it was totally "irrelevant" in the last paragraph of its opinion. See Pet. App. 8a. Rather, in that paragraph, the court properly rejected petitioners' argument that Brown's cover letter should be construed as an offer to limit the Form 872-A which was accepted by the IRS upon its execution of the form (Pet. App. 8a). Petitioners have apparently abandoned this position, for they now assert that the letters are significant *not* because they are binding on the parties but because they demonstrate a lack of mutual understanding. See Pet. 14.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

JAMES A. BRUTON
Acting Assistant Attorney General

RICHARD FARBER
JOY L. PRITTS
Attorneys

DECEMBER 1992

☆ U. S. GOVERNMENT PRINTING OFFICE: 1992 342479 60122